93-836

No. 93-___

Supreme Court, U.S.
FILED
NOV 23 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

v.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170

WILLIAM E. ANDREWS, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux

November 23, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), to require, after the fact, that the submitting state perform the duty to "identify" "unambiguously" the pre-existing law being repealed, when the Code of Federal Regulations at the time of the submission allowed entire acts to be submitted without specific identification of the repealed statutes being changed?

2. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer, supra*, to require the State in its Section 5 preclearance submission to anticipate and project the impact of a new state statute on future voting, including voting at county and municipal locations?

3. Whether, if the United States Attorney General can partially grant preclearance to portions of a statute submitted in its entirety, the burden then shifts to the United States Attorney General to identify unambiguously those portions of a voting change to which he objects, following *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), as to requirements regarding burden shift in a remedial statute?

4. Whether a municipal school district possesses standing under Section 5 of the Voting Rights Act to enjoin a state statute in the situation where the vote dilution requisite, the only "change affecting voting" for Section 5 jurisdiction, is created by the municipal school district's attempt to utilize the Voting Rights Act in this

QUESTIONS PRESENTED FOR REVIEW – Continued

action to expand its boundaries into a predominantly white area, thereby diluting existing black voting strength within the school district?

5. Did the three-judge district court err in construing its duties under Section 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?

6. Whether, or to what extent, must a federal three-judge court (1) give deference to a prior state supreme court ruling in an identical case construing Section 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), on Section 2 of the Voting Rights Act, and (2) be bound by the state supreme court's construction of a previously precleared statute as a matter of state law?

7. Given (1) that the appointment (as opposed to the election) of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a one person, one vote inquiry, (2) that a city has been held warranted under the Fourteenth Amendment in extending boundaries for certain purposes without assuming responsibility for all public functions, and (3) that *Milliken v. Bradley*, 418 U.S. 717 (1974), has generally prevented equal protection challenges from being raised across district lines, can the United States Justice Department claim Section 5 statutory coverage under the Voting Rights Act for a change affecting solely district boundaries for appointed school board members, particularly

QUESTIONS PRESENTED FOR REVIEW – Continued

after *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)?

8. Is a certain portion of Mississippi's Uniform School Law of 1986, the Section 47 repealer of Section 37-7-611, subject to preclearance procedures of Section 5 of the Voting Rights Act when it affects district boundaries of appointed school board members only, and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Com'n*, ___ U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)?

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as then members of the Board of Trustees of the Hattiesburg Public School District. Current Board of Trustee members are Dr. Ralph Noonkester, Marci McMahan, Daisy Thorne, Sam Buchanan and Warren G. Hood.

Defendants: Ray Mabus, in his capacity as Governor of the State of Mississippi, Mike Moore, in his capacity as Attorney General of the State of Mississippi, and the State of Mississippi.

Defendants/Intervenors: (1) The Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Freddie D. Howell and Dr. Johnny R. Purvis. James Sider has replaced Stephen High who replaced Rita Downs on the Board. Fred Boudreaux has replaced Dr. Johnny R. Purvis on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County School Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson. Current members of the Forrest County School Board are Mike Gilpin, Frank Myers, John E. Clark, W. Larry Thompson and Terry Ryals.

PARTIES TO PROCEEDINGS BELOW – Continued

Amicus Curiae: The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

The Plaintiffs in the Court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the District Court and is not a party to this appeal.

This Jurisdictional Statement is filed on behalf of The Lamar County Board of Education and Trustees in their official capacities. The Forrest County School District and Members of its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi are filing a separate jurisdictional statement, in which the Lamar County Board of Education also joins.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDINGS BELOW iv

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES viii

INTRODUCTION 1

OPINION BELOW 2

JURISDICTION 3

STATUTORY AND REGULATORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

ARGUMENT 8

Mississippi's Submission was Proper 8

The Decision Below Raises Questions As to the Proper Geographic Focus of a Section 5 Submission 9

The Burden of Proof Must Shift to the United States Attorney General 10

The District Court Erred in Construing Its Duties Under Section 5 of the Voting Rights Act When It Refused to Accept Evidence and Address a Remedy That Would Affect Voting 11

The Plaintiff Members of the Hattiesburg Municipal School District Lack Standing 12

The District Court Has Created An Impending Collision Between the Voting Rights Act and the Fourteenth Amendment 13

TABLE OF CONTENTS – Continued

Page

Should the Three-Judge Court Below Have Given Deference to the Mississippi Supreme Court? .. 15

The Ruling Below Was Contrary to *Presley v. Etowah County Commissioners* 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Brooks v. Georgia Board of Elections, 790 F. Supp. 1156 (S.D.Ga. 1990), *aff'd*, 498 U.S. 916, 12 L.Ed.2d 243 (1990) 12

Clark v. Roemer, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991) 1, 4, 9

Dupree v. Mabus, 776 F. Supp. 290 (S.D.Miss. 1991), *(Dupree I) vacated and remanded, Dupree v. Moore*, ___ U.S. ___, 117 L.Ed.2d 609, 112 S.Ct. 1462, 60 U.S.L.W. 3651 (1992) 2, 3, 11, 12, 18

Greenville Public School District, et al. v. Western Line Consolidated School District, et al., 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992) 7, 15

Growe v. Emison, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) 16, 17

Hathorn v. Lovorn, 457 U.S. 255 (1982) 16

Holt Civic Center v. Tuscaloosa, 429 U.S. 60 (1978) 14

Johnson v. De Grandy, 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993) 10

Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992) *Rivers v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted, in part, and cases consolidated*, ___ U.S. ___, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993) 9

Milliken v. Bradley, 418 U.S. 717 (1974) 14

Montero v. Mayer, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989) 18

TABLE OF AUTHORITIES – Continued

Page

Presley v. Etowah County Com'n, ___ U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992).....17, 18

R.A.V. v. City of St. Paul, Minnesota, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) 17

Reynolds v. Sims, 377 U.S. 533 (1964) 14

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) 10, 11, 12

Sailors v. Board of Education of Kent County, 387 U.S. 105 (1967)..... 14

Scott v. Germano, 381 U.S. 407 (1965)..... 15

Shaw v. Reno, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).....13, 15

Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) 14

Voinovich v. Quilter, ___ U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993)..... 17

STATUTES

28 U.S.C. Section 2101 3

42 U.S.C. Section 1973c 3

28 C.F.R. Section 51.25 (1986) 4

28 C.F.R. Section 51.27(b) (1987)..... 4, 6, 8

28 C.F.R. Section 51.35 (1986) 4

Miss. Code Ann. Section 37-7-103 (1972 & Supp. 1990).....4, 5

Miss. Code Ann. Section 37-7-611 (1972) ..... *passim*

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

v.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

INTRODUCTION

The Appellants have filed this interlocutory appeal from an injunction prohibiting enforcement of a Mississippi school law defining the geographic boundaries of urban and county school districts. The United States District Court for the Southern District of Mississippi, in its decision dated August 27, 1993, held that the State of Mississippi had failed to meet the standards of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), when the State identified the Uniform School Law of 1986 in its entirety as the complete act to be submitted for review under Section 5 of the

Voting Rights Act, as opposed to providing copies of statutes repealed by individual sections of the Act.

OPINION BELOW

Dupree v. Mabus, 776 F. Supp. 290 (S.D.Miss. 1991), (*Dupree I*) *vacated and remanded, Dupree v. Moore*, ___ U.S. ___, 117 L.Ed.2d 609, 112 S.Ct. 1462, 60 U.S.L.W. 3651 (1992).

The Memorandum Opinion and Order of the District Court on remand (*Dupree II*) will be reported; it is currently available as 1993 WL 332265 and 1993 U.S. Dist. Lexis 14181 (S.D.Miss. Aug. 27, 1993). The decision is reprinted in the Appendix filed by Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in Their Official Capacities, at App. A, p. 1a.[1]

On September 27, 1993, the three-judge district court entered its Order pursuant to Rule 60(a) of the Federal

[1] The Lamar County Board of Education and Trustees in their official capacities adopts the Appendix, A through Q, which appears in the Jurisdictional Statement of Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their Official Capacities, referenced as page numbers 1a through 208a. Appendix A and B annexed to this Jurisdictional Statement from Lamar County Board of Education and Trustees bear page numbers App. 1 through App. 11.

Rules of Civil Procedure to correct clerical mistakes. App. B, p. 33a.

On October 29, 1993, the three-judge district court entered its Order concerning Defendants' joint motions for new trial or to alter or amend, joint motion for remedy, and joint motion to stay pending appeal. App. A, p. App. 1.

JURISDICTION

The District Court entered its injunction on August 27, 1993. A Notice of Interlocutory Appeal was filed on September 24, 1993. The Court has jurisdiction of this appeal pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 2101.

The Lamar County Board of Education and Trustees joins the Jurisdictional Statement being filed concurrently by Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in Their Official Capacities, except to clarify that rulings from *Dupree I* are not to any extent foreclosed from review.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. Section 1973c

This statute is reprinted in App. O, p. 204a.

28 C.F.R. Section 51.25 (1986)

This regulation is reprinted in App. P, p. 206a.

28 C.F.R. Section 51.27(b) (1986)

Each submission should contain the following information on documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

> A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

28 C.F.R Section 51.35 (1986)

This regulation is reprinted in App. Q, p. 208a.

Miss. Code Ann. Section 37-7-611 (1972)

This statute is reprinted in App. H, p. 144a.

Miss. Code Ann. Section 37-7-103 (1972 and Supp. 1990)

The two versions of this statute are set forth in App. G, pp. 113a and 114a.

STATEMENT OF THE CASE

This case is on appeal after remand for consideration in light of *Clark v. Roemer*, 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). App. E, p. 68a. The question considered by the three-judge court on remand was whether the repeal of Section 37-7-611, Miss. Code Ann. (1972) was precleared following the submission by the State of Mississippi of the entire Uniform School Law of 1986. The Uniform School Law contained the repealer of Section 37-7-611, at its Section 47.

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, embodied in the education reform act called the Uniform School Law of 1986. (App. G, p. 84a). One section, Section 47 of the Uniform School Law, repealed a former provision, Section 37-7-611, which governed the modification of school district boundaries when territory is annexed by a city. Section 37-7-611 had held that an urban school district's geographic boundaries were coterminous with city limits. Annexations by cities therefore automatically expanded school boundaries. Another section, Section 52 of the Uniform School Law, amended Miss. Code Ann. Section 37-7-103 (1972) to give the board of each school district the authority to control the geographic boundaries of the school district. Section 52 provides that a school district may move its geographic boundaries into a neighboring district only with the consent of the neighboring district. It is uncontested that Section 52 of the Uniform School Law was precleared under Section 5 of the Voting Rights Act.

Prior law under Section 37-7-611 had provided that when a city annexed territory, the municipal school district automatically expanded to become coextensive with the newly created city limits. The repeal of Section 37-7-611 under the Uniform School Law would end the automatic expansion of school district territories to municipal boundaries upon annexation. The method of expanding a school district into neighboring territory would then reasonably be governed by Section 52 of the Uniform School Law which required the consent of the neighboring school board before the expansion of a school district corresponding to a city's expansion would take place.

28 C.F.R. Section 51.27(b) (1987) now provides that a copy of any repealed statute should be included with a Section 5 submission of the repealing legislation. That specific regulation was not in effect at the time of this State's submission of the Uniform School Law of 1986.

On July 22, 1986, the State of Mississippi identified the Uniform School Law to the Attorney General for preclearance under Section 5 by submitting that "Mississippi Uniform School Law of 1986 . . . is submitted . . . in its entirety," and, again, that "the complete act is submitted for review." (App. F, p. 72a).

On August 29, 1986, the Attorney General of the United States represented that he did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." (App. I, p. 147a).

On March 31, 1989, the Attorney General interposed an objection to Section 47, the repealer of Section 37-7-611. (App. L, p. 165a) (specifically noting that, "we recognize that demographic patterns are not uniform throughout the state . . . ", p. 166a). After the State objected, (App. M, p. 169a) the Attorney General again determined it would not withdraw the objection by its letter of May 25, 1990 (App. N, p. 199a) arguing that the Attorney General should not have the responsibility of uncovering prospective voting changes "of which the state itself seemingly was unaware at the time the prior submissions were made." (App. N, p. 201a).

This civil action commenced on February 23, 1990. Meanwhile, and before any ruling was issued in the instant case, the Mississippi Supreme Court determined

that it had concurrent jurisdiction with the local three-judge federal district court and held that the repealer of Section 37-7-611 had been precleared pursuant to Section 5 of the Voting Rights Act and further held that Section 52 of the Uniform School Law was "a subsequent enactment covering a field of operation co-existent with [Section 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." These judgments by the State Supreme Court were dismissed without discussion by the three-judge federal court in *Dupree II* by the single sentence footnote 10, "Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of Section 37-7-611 when he precleared Section 52." (App. A, p. 19a, n. 10).

The Attorney General had concluded that repealing the automatic school district annexation provisions of Section 37-7-611 would be "likely to create a class of city voters (for the most part predominately white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." (App. L, p. 167a). The Attorney General also noted that the State of Mississippi had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently from white voters." (Letter of

March 31, 1989 from the United States Attorney General, App. L, p. 167a).

There have been no evidentiary hearings below. The case was disposed of on summary judgment when the District Court held that enforcement of the repealer of Section 37-7-611 was enjoined.

ARGUMENT

MISSISSIPPI'S SUBMISSION WAS PROPER

When the State submitted the Section 47 repealer of Section 37-7-611 in the Uniform School Law to the United States Attorney General in 1986, there was no requirement in effect that the State provide and/or identify pre-existing statutes as a part of its submission. The regulations of the Justice Department then in effect did not make it incumbent upon the State to identify specifically the pre-existing law when it described the new provisions of state law which were to go into effect if precleared.[2] As the District Court found, "While the text of Section 47 appeared in the notebook [submitted by the State], the texts of the 23 provisions repealed by Section 47 were not included." (App. A, p. 19a) and, "[h]ence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal

[2] The pertinent regulations are now changed, the old – 28 C.F.R. 51.25(b) is supplanted by the new 28 C.F.R. 51.27(b) (1987) providing that a copy of any repealed statute should be included with the Section 5 submission of the repealing legislation.

school districts without requiring the consent of the school board governing the affected, annexed territory." (Page 19 of the Opinion, App. A, p. 18a).

It is pointed out in the dissent in the District Court below that this ruling exceeds the holding of *Clark v. Roemer,* 500 U.S. ___, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). The set of circumstances here presented raises questions of due process requirements for notice to submitting authorities of regulations imposed by the Department of Justice. A question is presented as to whether the Justice Department should be estopped from applying regulations other than those in effect when the submission was first made. Additionally, this ruling below raises questions of retroactive application of civil rights rules, currently before this Court in *Landgraf v. USI Film Products,* 968 F.2d 427 (5th Cir. 1992) *Rivers v. Roadway Express, Inc.,* 973 F.2d 490 (6th Cir. 1992), *cert. granted in part,* and cases consolidated, ___ U.S. ___, 113 S.Ct. 1250, 122 L.Ed.2d 649 (1993). It would be appropriate to remand this case in light of whatever results are obtained in that case during this term of Court.

THE DECISION BELOW RAISES QUESTIONS AS TO THE PROPER GEOGRAPHIC FOCUS OF A SECTION 5 SUBMISSION

The impact of the District Court's ruling would be to require the submitting authority not only to anticipate regulatory changes, but also to anticipate the impact of a new state statute on future voting, including voting at county and municipal locations. There is nothing in *Clark v. Roemer, supra,* which requires or addresses this result. There is a question as to what is the proper geographic

focus for a voting rights claim, that is, whether a statewide overview or a geographically compact denomination of minority interests is correct. This issue is before the Court this term in *Johnson v. De Grandy*, 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993). It would be appropriate to remand this case in light of the *Johnson v. De Grandy, supra*, decision whenever it is issued during this term of Court.

THE BURDEN OF PROOF MUST SHIFT TO THE UNITED STATES ATTORNEY GENERAL

Last term, this Court decided *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), to establish the point at which the burden of proof would shift in civil rights employment suits brought under Title VII. The Court and the parties needed to know who would bear the burden of going forward or the burden of persuasion.

In 1986 and thereafter, uncertainty developed in Section 5 of the Voting Rights Act as to whether the State continued to bear the burden of proof after it had submitted its proposed new legislation for preclearance. The law required the United States Attorney General to request additional information, or object, if not satisfied with the submission. Much of the confusion in this case has developed because the Attorney General did not request further information, and did not clearly object. Instead, the United States Attorney General sent what appeared to be its boiler-plate preclearance letter. Nowhere did that letter unambiguously identify the voting changes to which the Attorney General had objection, neither did it request

further information. To use *St. Mary's* as a parallel, the Justice Department not only did not identify a reason for its objection, it did not identify its objection itself. The State, having identified its new Uniform School Law, had received what appeared to be a preclearance letter rather than an objection or request for more information from Justice. It was this lack of clear statement from the United States Attorney General which led to the District Court's decision in *Dupree I*, 776 F. Supp. 290 (S.D.Miss. 1991), that, because the Attorney General had not objected, Section 47 was precleared.

Although the District Court did not abide by that result in its more recent decision below, the confusion which has been produced throughout this case is more the product of the ambiguity of the Attorney General's transmittal than the fault of any concealment of information on the part of the State. The Justice Department should be clear and understandable in its response to Section 5 submissions. It would be helpful to all parties, in this and other cases, to have clearly delineated the burdens of proof, so that such confusion can be avoided in the future. This case may be remanded in light of *St. Mary's*.

THE DISTRICT COURT ERRED IN CONSTRUING ITS DUTIES UNDER SECTION 5 OF THE VOTING RIGHTS ACT WHEN IT REFUSED TO ACCEPT EVIDENCE AND ADDRESS A REMEDY THAT WOULD AFFECT VOTING.

The District Court rejected the opportunity to accept evidence and ruled on this case by summary judgment, as a matter of law. (Order, App. A, p. 1a). It did make critical

fact findings however, such as its finding that a prediction of white controlled city and school district elections was correct. The Court refused to accept proof as to how to fashion an appropriate remedy. This ruling below leaves the parties in doubt as to how to hold elections.

Brooks v. Georgia Board of Elections, held that a three-judge court has limited discretion to fashion an appropriate remedy in a Section 5 action, 790 F. Supp. 1156 (S.D.Ga. 1992). This recent *Brooks* decision highlights a split of authority in the courts below regarding the scope of the remedial powers of a three-judge district court. It would be appropriate to remand this case for further consideration, both as to the burden of proof shift under *St. Mary's*, discussed above, and for the fashioning of an appropriate remedy.

THE PLAINTIFF MEMBERS OF THE HATTIESBURG MUNICIPAL SCHOOL DISTRICT LACK STANDING

To find Section 5 jurisdiction, the Court below had to find changes in voting practices and procedures. In *Dupree I*, the District Court held that Section 47 of the Uniform School Law resulted in a class of city voters who did not reside in the city school system, but who did participate in city elections, which led to the appointment of the school district members, thereby indirectly affecting the vote.[3] However, enjoining Section 47, on the city

---

[3] See discussion of changes affecting voting at pages 5 and 6 of the District Court's Opinion in *Dupree II*. (App. A, pp. 5a and 6a). Notice that the sections quoted in *Dupree II* make reference to "voting" in every clause (App. A, p. 5a); there is no mention of indirect effect or impact upon appointive officers.

school board's own argument, brings about an automatic extension of the school district boundaries to be conterminous with the city limits. The result is that the same class of voters, presumably white, who will now reside in both the city and the school district, still vote in the city elections, still elect those who appoint the school board, and so still dilute minority voting strength.

The Plaintiff school board should not have standing to seek the very dilution of minority voting strength which gives rise to Section 5 jurisdiction in this matter.

THE DISTRICT COURT HAS CREATED AN IMPENDING COLLISION BETWEEN THE VOTING RIGHTS ACT AND THE FOURTEENTH AMENDMENT

Last term in *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court determined that white citizens have standing under the Fourteenth Amendment to challenge a voting rights remedy which gerrymandered a long, thin, snake-like corridor of minority voters together in order to maximize minority voting strength.

In the past, issues raised by the case here at bar have not found themselves subject to relief under the Fourteenth Amendment, but rather have been at the dividing line at which the courts would not recognize Fourteenth Amendment relief. There are three areas which serve as examples. First, the appointment, as opposed to the election, of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of

a *Reynolds v. Sims*[4] "one person, one vote" inquiry. *Sailors v. Board of Education*, 387 U.S. 105 (1967). In *Sailors*, one person, one vote relief was denied where a county board of education was basically appointive rather than elected, and there was some discussion that the board was more fundamentally administrative than legislative. Second, a city has been held warranted under the Fourteenth Amendment in extending its boundaries for certain purposes[5] without assuming responsibility for all public functions. *Holt Civic Center v. Tuscaloosa*, 429 U.S. 60 (1978). Similarly, it may be noted that in *Town of Lockport v. Citizens for Community Action*, the United States Supreme Court stated that "A proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district," 430 U.S. 259, 271 (1977). Under these Fourteenth Amendment cases it appears that the boundary disputes here at issue would be beyond the reach of the Equal Protection Clause. Third, *Milliken v. Bradley*, 418 U.S. 717 (1974), has generally prevented equal protection challenges being raised across school district lines.

Given these developments in the case law, an issue exists as to whether the United States Justice Department can claim Section 5 statutory coverage under the Voting Rights Act for a change affecting district boundaries for

---

[4] 377 U.S. 533 (1964).

[5] The certain purposes recognized were that the city could extend its (1) police, (2) sanitary, and (3) business licensing powers to individuals living within 3 miles of the city's corporate boundaries, meeting a rational basis test under the Fourteenth Amendment.

appointed school board members, particularly after *Shaw v. Reno*. Allowing the Justice Department a broader sweep through its Section 5 powers will put it on a collision course with private claims brought under the Fourteenth Amendment.

SHOULD THE THREE-JUDGE COURT BELOW HAVE GIVEN DEFERENCE TO THE MISSISSIPPI SUPREME COURT?

Whether or to what extent must a three-judge court give deference to a prior state Supreme Court ruling on the identical issue construing Section 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), which held that a state has primacy in the redistricting domain under Section 2 of the Voting Rights Act. There, relying on *Scott v. Germano*, 381 U.S. 407 (1965), the United States Supreme Court required federal courts to recognize that the state's instrumental role in redistricting inheres in the judicial branch as well as the legislature. "Minnesota can have only one set of legislative districts, and the primacy of the state in designing those districts compels the federal courts to defer." *Ibid.*, at 122 L.Ed.2d 400.

Here, during the pendency of this case, the Mississippi Supreme Court decided in *Greenville Public School Dist., et al. v. Western Line Consol. School Dist., et al.*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), that Section 47 had been precleared and that if Section 47 had not been specifically precleared, it had been precleared by implication. The Mississippi Supreme Court also construed state law by

holding that Section 52 which was precleared,[6] was in conflict with Section 47 and due to rules of statutory construction Section 52 would prevail. In light of that decision, and its subsequent denial of certiorari, the result in *Greenville, Mississippi,* and in any other city able to litigate only in state court, will be to design city limits and school districts in accordance with Sections 47 and 52, while expanding cities which are found under jurisdiction of the federal courts will be enjoined from use of Section 47.[7] Thus as in *Growe v. Emison, supra,* the State can have only one set of school districts, but the divergent results of the state and federal courts allow two different rules of law to compete.[8] The District Court

---

[6] Section 52 was among the 13 express submissions of the State of Mississippi explicitly identified in the submission of the Uniform School Law of 1986 to which the United States Attorney General specifically entered no objection. (App. G, p. 84a). Since Section 52, mandating consent by all school districts before school boundaries can change, was precleared, the more specific Section 47, applying only in municipal annexations, must have been precleared.

[7] The remedial effect and impact of Section 52 if 47 is enjoined remains undecided by the Court below. The Court has not ruled on the Joint Motion for Remedy filed by the Lamar County Board of Education and Trustees in their Official Capacities, Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi, and Forrest County School District and Trustees. (App. A, p. App. 1).

[8] In *Hathorn v. Lovorn,* 457 U.S. 255, 269 n.23 (1982), the Court stated: "[p]ersons dissatisfied with a state court's . . . resolution of a Section 5 issue in proceedings involving other parties . . . are likely to be able to litigate the issue anew in federal court." *Hathorn* did not discuss the possibility of, for example, collusive suits being brought in a chosen forum to obtain a chosen result.

below has ignored the primacy of the State in designing those districts. It is this primacy to which a federal district court should be compelled to defer. *Growe v. Emison, supra.* That ruling concerning Section 2 of the Voting Rights Act should be extended by analogy to Section 5 of the same Act.[9]

There is also the question as to whether the District Court should be bound by the State Supreme Court's construction of a previously precleared statute. If the rulings of *Greenville, Mississippi* are construed as a matter of state law, recent pronouncements from the United States Supreme Court would seem to make it clear that the state construction would control. "In construing the . . . ordinance, we are bound by the construction given it by the Minnesota court." *R.A.V. v. City of St. Paul, Minnesota,* ___ U.S. ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).

THE RULING BELOW WAS CONTRARY TO *PRESLEY V. ETOWAH COUNTY COMMISSIONERS*

Is a certain portion of Mississippi's Uniform School Law, the repealer of Section 37-7-611, Section 47 of the Uniform School Law, subject to preclearance procedures of Section 5 of the Voting Rights Act when it affects district boundaries of an appointed school board and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Commissioners,*

---

[9] It appears unresolved whether influence dilution claims are actionable under Section 2 of the Voting Rights Act. *See, e.g., Voinovich v. Quilter,* ___ U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). It also appears to be an open question whether the Fifteenth Amendment applies to vote dilution claims. *Id.*

___ U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)? The Court in *Dupree I* found Section 5 applicable on the basis of an "indirect" effect on voting. The District Court below recognizes that the school district is not itself an elective body in Hattiesburg, Mississippi. The Board is appointed by the elected Hattiesburg Board of Aldermen. Last term in *Presley v. Etowah County Commissioners, supra,* the United States Supreme Court held that changes in the appointive powers of elected officials are not subject to the Voting Rights Act.

There is, additionally, a conflict among the circuits in determining when particular political expression or organization constitutes "voting." Previously, for example, the Tenth Circuit had held that espousing or appointing a particular political viewpoint through the signing of an initiative was not "voting" within the meaning of the Voting Rights Act of 1965. *Montero v. Mayer,* 861 F.2d 603 (10th Cir. 1988), *cert. denied,* 492 U.S. 921 (1989). The ruling from the District Court cannot be reconciled with these prior decisions.

CONCLUSION

This case raises so many problems because it is attempting to apply the Voting Rights Act at cross purposes with the Congressional intent behind that civil rights legislation. The Plaintiffs/Appellees, Hattiesburg School District, are not the disenfranchised, under-represented and poor, as the civil rights acts presume. These Plaintiffs/Appellees are the appointed members currently serving under an elected and serving city

government. The Plaintiff city school district is not seeking to maximize minority voting strength, but to dilute it.

Just as the attorneys' fees provisions of the civil rights statutes are not designed to provide fees to defendants acting under color of state law, neither are the substantive provisions of the civil rights statutes intended to secure political advantage for municipal governments in ongoing turf battles. There is a risk that the District Court's Opinion below, left uncorrected, would lead to the future use of the Voting Rights Act as a common weapon in the arsenal of local politicians, rather than bringing about the equalization of political representation, as was the intent of the Voting Rights Act.

Respectfully submitted,

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170

WILLIAM E. ANDREWS, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

Counsel for Appellants The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux

November 23, 1993

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

JOHNNY DUPREE, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. H90-0043(W)

MIKE MOORE, ET AL. DEFENDANTS

and

THE LAMAR COUNTY BOARD OF EDUCATION, DEFENDANTS/INTERVENORS

and

FORREST COUNTY SCHOOL DISTRICT, ET AL. DEFENDANTS/INTERVENORS

ORDER

(Filed Oct. 29, 1993)

The matter is before the Three-Judge Court on the motion of the defendants Mike Moore, Attorney General of Mississippi, in his official capacity, and the State of Mississippi, and the defendants/intervenors Lamar County Board of Education and Trustees and Forrest County School District for new trial or to alter or amend the opinion and order of the Three-Judge Court issued August 27, 1993. Also before the Three-Judge Court are the defendants' joint motion for remedy and a joint motion to stay pending appeal.

The defendants filed a notice of interlocutory appeal to the Supreme Court of the United States on September

24, 1993. The Three-Judge Court has reviewed the defendants' motions for new trial or to alter or amend order and the joint motion for remedy and finds that the relief requested pursuant to these motions would intrude needlessly upon the proceedings now pending before the Supreme Court of the United States. Therefore, the Three-Judge Court shall withhold ruling on these motions until such time as the Supreme Court of the United States has reached its conclusion with regard to the matter now on appeal.

The joint motion of the defendants for stay pending appeal is denied.

SO ORDERED AND ADJUDGED this the 29th day of October, 1993.

/s/ Rhesa Barksdale
RHESA BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom S. Lee
TOM S. LEE
UNITED STATES DISTRICT JUDGE

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

Dupree v. Moore, H90-0043

APPENDIX B

STATE OF MISSISSIPPI
[SEAL]
OFFICE OF THE ATTORNEY GENERAL

JIM WARREN
Special Assistant to
the Attorney General
FRANK SPENCER
Assistant Attorney General
Director, Public Advocacy
BEVERLEY D. COLEMAN, CPA
Director, Administration

MIKE MOORE
ATTORNEY
GENERAL

STEPHEN J. KIRCHMAYR
Deputy Attorney General
Litigation
ROBERT L. GIBBS
Deputy Attorney General
State/Local Government,
Opinions

January 27, 1989

Honorable Gerald W. Jones
Chief, Voting Section
Civil Rights Division
P. O. Box 66128
Washington, D.C. 20035-6128

Re: Supplemental Information Requested
Chapter 492, § 47 (1986)
Your File Nos. T0966 and T3369

Dear Mr. Jones:

On July 22, 1986, the State of Mississippi submitted Chapter 492 Laws of 1986 for preclearance under Section 5 of the Voting Rights Act of 1965, as amended and extended (42 U.S.C. § 1973(c)). On August 29, 1986, Chapter 492 was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.

On December 30, 1987, the State of Mississippi submitted Section 47 of Chapter 492 since Section 47 was not specifically identified in our original submission. On March 2, 1988, we received your letter dated February 29, 1988 requesting additional information to be considered in connection with your review of Section 47. In response to

these requests, the following information is submitted, to-wit:

Request No. 1.

1. A detailed description of the process that resulted in the repeal of §37-7-611. In that regard, we understand that a committee appointed by the State Auditor prepared draft legislation which was the basis for Chapter 492, and that the committee's proposal did not provide for the repeal of § 37-7-611. Identify the specific manner in which the repealer was incorporated into Chapter 492 and, if it was added by an amendment, provide a breakdown of votes, by member, for that amendment. Identify the legislators who were the principal proponents of the repeal and provide daytime telephone numbers at which they may be contacted. Provide copies of any legislative analyses of the meaning and effect of the repealer and all newspaper articles, editorials, and letters to the editor concerning the repeal of §37-7-611.

Response to Request No. 1.

As stated in our submission of Section 47, the obvious reason for this repealer provision is to void any piecemeal legislation dealing with the subject addressed in the uniform school law. Section 47 is simply a house cleaning measure for Chapter 492, most of which has already been precleared by the United States Justice Department. It is error to view the inclusion of the repeal of Section 37-7-611 as an isolated legislative act.

The repeal of Section 37-7-611 and the numerous other code provisions repealed by Section 47 of Chapter 492 were incorporated into the original senate draft of the uniform school law. It was not added by way of amendment. On information from Mr. Robert Davidson, Staff Attorney for the Senate Interim Committee to Study Public School Finance and Administration, who was also a member of the State Auditor's Advisory Committee, the

repeal of Section 37-6-611 was incorporated into the draft of the legislation submitted to the Senate Committee by the Advisory Committee appointed by the state auditor. Attached hereto as Appendix A are various memoranda establishing the Auditor's Committee, listing its members, and outlining its efforts.

Chapter 492, as declared by Section 1 thereof, is known as the "Mississippi Uniform School Law of 1986. The purpose of this legislation is aptly stated in Section 2 of the act, to-wit: "From and after July 1, 1987, all school districts in the State of Mississippi shall have the same prerogatives, powers, duties, and privileges as provided in this act."

In order to accomplish uniformity in the powers, duties and privileges in all school districts, it was necessary to repeal numerous sections of the old education law that were inconsistent with the purpose and provisons of Chapter 492. Accordingly, Sections 44 through 51 of Chapter 492 repealed a total of seventy-two (72) provisions of the old education law. Section 44 repealed eleven (11) sections which prescribed the powers and duties of county boards of education. Section 45 repealed three (3) sections which provided for the organization of boards of trustees of municipal separate and consolidated school districts. Section 46 repealed two (2) sections which provided for the expenditure of school district funds for incidentals and further provided for contracts for attendance and transportation of pupils by municipal separate school districts. Section 47 repealed twenty-three (23) sections which provided for the creation and operation of municipal separate school districts, one of which was Section 37-7-611. Section 48 repealed twelve (12) sections which provided for the operation of special municipal separate school districts. Section 49 repealed six (6) sections which provided for the creation and operation of line consolidated school districts. Finally, Section 51 repealed nine sections which mandated and provided for a reorganization of school dis-

tricts in 1957. The specific code sections repealed by Sections 44 through 51 of Chapter 492 are as follows:

37-5-21	37-7-313	37-7-629	37-7-733	37-7-903
37-5-23	37-7-601	37-7-631	37-7-735	37-7-905
37-5-25	37-7-603	37-7-633	37-7-737	37-7-907
37-5-27	37-7-605	37-7-635	37-7-739	37-7-909
37-5-29	37-7-607	37-7-637	37-7-741	37-7-911
37-5-31	37-7-609	37-7-639	37-7-743	37-7-1
37-5-33	37-7-611	37-7-641	37-7-745	37-7-3
37-5-35	37-7-613	37-7-643	37-7-801	37-7-5
37-5-37	37-7-615	37-7-645	37-7-803	37-7-7
37-5-39	37-7-617	37-7-719	37-7-805	37-7-9
37-5-41	37-7-619	37-7-721	37-7-807	37-7-11
37-7-231	37-7-621	37-7-727	37-7-809	37-7-13
37-7-233	37-7-623	37-7-729	37-7-811	37-7-15
37-7-235	37-7-625	37-7-731	37-7-901	37-7-17
37-7-309	37-7-627			

As previously stated, the repeal of Section 37-7-611 cannot properly be viewed as an isolated legislative act as your several requests suggest. It was repealed together with a host of other laws for the purpose of placing all school districts on an equal footing, so that after July 1, 1987 all school districts in the state would have the same prerogatives powers, duties and privileges as mandated by Section 2 of Chapter 492. In this context, it should be noted that the sponsors of Chapter 492 sponsored the bill in its entirety and cannot be singled out as "principal proponents of the repeal of Section 37-7-611." The sponsors of Chapter 492 were as follows: Senators Jack Gordon, Irb Benjamin, Rob Smith, Alan Heflin and Cy Rosenblatt. The Mississippi Legislature is currently in session and these senators can be reached during the day at (601) 359-3770. The members of the Mississippi House of Representatives Education Committee who were instrumental in the passage of the Uniform School Act were as follows: "Representatives Robert Clark, Rick Fortenberry, Horace Buckley, Billy McCoy, Thomas Walman, and Jerry

Wilkerson. These representatives can also be reached at the above phone number.

Request No. 2.

A detailed explanation of the reasons for the repeal of §37-7-611, and identify the sources of your information as to the reasons for the repeal. Indicate whether the repeal was related to any particular pending or planned annexations by municipalities which have municipal separate school districts. We note that you have indicated that the reason for repealing §37-7-611 was that it was "piecemeal legislation" concerning the method by which school district boundaries may be altered. However, it has been alleged that there are special circumstances which justify the provision in §37-7-611 that when a municipality with a municipal separate school district annexes territory located in an adjacent school district the boundaries of the municipal school district also are automatically extended into the adjacent district. Once such special circumstance may be that the persons annexed into the municipality thereby become eligible to vote for the municipal governing body which in turn appoints the members of the municipal school district's board of trustees. Indicate the extent to which this circumstance was considered in determining that §37-7-611 should be repealed. It also would be helpful if you would provide information as to the legislative history of § 37-7-611 and the reasons for its adoption.

Response to Request No. 2

The Attorney General's Office has contacted legislators, legislative staff, education officials and school board attorneys[1] as to the reason for the repeal of Section 37-

[1] School officials and attorneys for Hattiesburg Public School District, Western Line Consolidated, Greenville Municipal, Harrison County, Biloxi and Gulfport schools and municipalities have filed written statements with your office expressing their views regarding the repeal of Section 37-7-611.

7-611. Other than one suggestion that the repeal of Section 37-7-611 was mistakenly incorporated into Chapter 492, the general view held is that the repeal of this section and the seventy one (71) other code sections were consistent with the legislative purpose to create uniformity among the various types of school districts by granting all districts the same prerogative powers, duties and privileges. The repeal of Section 37-7-611 was not considered separately but rather was considered together with the repeal of all the provisions listed in response to Request No. 1 which concerned the creation and operation of the various types of school districts existing under the prior education law. The *Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi* contains the following statement:

> "Mississippi schools currently operate under four different kinds of school districts—eight if you count the sub-categories—each with its own system of government and finance. In addition to municipal separate districts, the state now has special municipal separate, consolidated and countywide school districts. These types of districts were the result of the Special Session of the Legislature in 1953 which reduced more than 2,000 Mississippi school districts to 151 school districts, and were considered necessary at that time. Several types of districts in existence today are still serving well but there are flaws in each. *It appears that if there were only one type of district so that all of the laws pertaining to districts would apply to each district in the state, rather than special laws for special types of districts, the administration and operation of school districts would be more effective and beneficial to the state.*" (Emphasis added)

Excerpts of the *Report of the Senate Interim Committee to Study Public School Finance and Administration in Mississippi* are attached hereto as Appendix B.

The repeal of Section 37-7-611 and the seventy-one (71) other "special laws for special types of districts "were considered essential to effectuating the purpose of Chapter 492. It does not appear that consideration was given to any special circumstances that may have justified leaving the provisions of Section 37-7-611 in tact. It was apparently felt that the provisions of Section 52 of Chapter 492 authorizing school districts to abolish or reorganize such districts or change or alter the boundaries of any school district would still allow school districts the option to expand and at the same time extend to all school districts the same privileges.

Section 37-7-611 was first enacted at the 1953 Extraordinary Session of 1953 as Chapter 23 §6. It was revised by Chapter 29, §1, 1959 Extraordinary Session. The 1959 amendment did not change the relevant language of Section 37-7-611. Copies of these chapter laws are attached as Appendix C. Similar annexation provisions existed under earlier Mississippi Codes, e.g., see Chapter 315, § 1 of 1926 Laws, a copy of which is included in Appendix C.

Request No. 3.

Identify the minority legislators or minority citizens who specifically were consulted regarding the inclusion of this repealer in Chapter 492 and summarize the comments they provided. If no minority legislators or citizens were consulted, explain the reasons for this omission.

Response to No. 3.

Like Request Nos. 1 and 2 above, this request presupposes that the repeal of Section 37-7-611 was given separate and individual consideration and that it was viewed as something other than a house cleaning measure. Several minority legislators were instrumental in the passage of

Chapter 492. Two in particular were Representative Robert Clark and Representative Horace Buckley. They can be reached during the day at (601) 359-3770.

Request No. 4.

It has been alleged that annexations by municipalities which have municipal separate school districts generally are of predominantly white residential areas, and that the repeal of § 37-7-611's automatic boundary extension provision will permit municipal annexation of these areas and, at the same time, allow those whites to remain in predominantly white school districts that adjoin predominantly black municipal school districts. Please provide us with whatever information the state has which may be enlightening on this issue. In particular, include information on the population, by race, of any annexations proposed by "municipal school district" cities which currently are pending in a chancery court or other proceeding (if an annexation of proposed annexation includes an area that was part of the "added territory" of the municipal school district, provide the requested population data separately for the annexed "added territory" and the annexed area that was not in the municipal school district). Include the student population, by race, of each municipal separate school district in the state and each county, consolidated, and consolidated line school district that adjoins a municipal school district.

Response to Request No. 4.

The State of Mississippi does not maintain a centralized system for the reporting of municipal annexations. The U. S. Department of Justice is the only agency to our knowledge that maintains these records.

While the data sought by this request may be a permissible inquiry in the context of examining any alleged discriminatory purpose underlying the repeal of Section 37-7-611, which we submit cannot exist in this case, the

data sought, i.e. the racial composition of school population is totally irrellevant to a Section 5 inquiry.

Additionally, in view of the Section 5 preclearence requirements with respect to municipal annexations, and in light of the establishment of single member education 523 of the 1988 Laws of Mississippi, we cannot see how the repeal of Section 37-7-611 can operate so as to impermissibly dilute or restrict minority voting rights. It is noted that the *Joint Resolution Memorializing the Repeal of Section 37-7-611, Miss. Code of 1972, as amended, for Preclearance by the United States Department of Justice*, filed with your office by officials of Harrison County, Biloxi and Gulfport School Districts, as well as the officials of the cities of Gulfport and Biloxi, express the view in its accompanying cover letter that if Section 37-7-611 were to be enforced in their area, it would operate to dilute minority voting strength in the election of the members to the Harrison County School Board.

If you have any questions about this response, please contact the undersigned at (601) 359-3839, Also, Mr. Robert Davidson, who was Staff Attorney for the Senate Interim Committee to Study Public School Finance and Administration, is very familiar with the legislative history of the Uniform School Law and he can be reached at (601) 359-3217.

Sincerely,

/s/ Giles W. Bryant
Giles W. Bryant
Special Assistant Attorney General

/jw

(2) (2)

No. 93-835 and No. 93-836

FILED
DEC 23 1993
OFFICE OF THE CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MIKE MOORE, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal From
The United States District Court
For The Southern District of Mississippi

MOTION TO DISMISS OR AFFIRM

HOLMES S. ADAMS
(Counsel of Record)
W. DAVID WATKINS
PERRY SANSING
BRUNINI, GRANTHAM, GROWER & HEWES
Post Office Drawer 119
Jackson, Mississippi 39205
(601) 948-3101

Counsel for Appellees

December 23, 1993

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether the Appellants' motion filed pursuant to Fed. R. Civ. P. 59 suspended the finality of the District Court's order and rendered ineffective the notice of appeal filed prior to a decision on the Rule 59 motion?

Whether the District Court properly applied Clark vs. Roemer, 500 U.S. ___, 114 L. Ed. 691 (1991), in holding that the Attorney General did not preclear under § 5 of the Voting Rights Act a voting change that was not specifically identified in the State's submission of other related voting changes?

PARTIES TO THE PROCEEDING BELOW

The parties in the court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos. The current members of the school board of the Hattiesburg Public School District are Ralph Noonkester, Marci McMahan, Daisy Thorne, Sam Buchanan and Warren Hood.

Defendants: Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi.

Defendants/Intervenors: Lamar County School District and its Board of Trustees. The members of the Lamar County Board are: Charles L. Cameron, James Sider, Tommy Graham, Freddie D. Howell and Fred Boudreaux.

Defendants/Intervenors: Forrest County School District and its Board of Trustees. The members of the Forrest County Board are: Terry Ryals, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson.

Amicus Curiae: The United States participated as amicus curiae.

The Plaintiffs in the court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

MOTION TO DISMISS OR AFFIRM 1

STATEMENT OF THE FACTS 2

ARGUMENT 11

A. The appeal should be dismissed because the Appellants filed their notice of appeal before the District court decided the Appellants' Rule 59 motion. 11

B. The question is not substantial because the District Court's interpretation of the preclearance requirements of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act. 14

CONCLUSION 22

APPENDIX

APPENDIX A — Appellants' Joint Motion for New Trial, or to Alter or Amend Order, September 13, 1993 . . . . . 1a

TABLE OF AUTHORITIES

Page

CASES

Allen vs. State Board of Elections,
393 U.S. 544 (1969) 15, 19

City of Rome vs. United States,
446 U.S. 156 (1980) 15

Clark vs. Roemer,
500 U.S. ___, 114 L. Ed. 691 (1991)
. . . . . i, 4, 10, 14-19, 21, 22

Communist Party vs. Whitcomb,
414 U.S. 441 (1974) 13

Department of Banking vs. Pink,
317 U.S. 264 (1942) 14

Dupree vs. Mabus,
776 F. Supp. 290 (S.D. Miss. 1991)
. . . . . 2, 4, 10, 21, 22

Dupree vs. Moore,
831 F. Supp. 1310 (S.D. Miss. 1993)
. . . . . 4, 10, 11, 14, 16, 17, 21

FCC vs. League of Women Voters,
468 U.S. 364 (1984) 12-14

Georgia vs. United States,
411 U.S. 526 (1973) 20, 21

Greenville Public School Dist. vs.
Western Line Public School Dist.,
575 So. 2d 956 (Miss. 1990),
cert. denied, 117 L. Ed. 2d 649 (1991) 17

McCain vs. Lybrand,
465 U.S. 236 (1984) 15, 17, 19

Morris vs. Gressette,
432 U.S. 491, 503 (1977) 19-20

United States vs. Board of Comm'rs,
435 U.S. 110 (1978) 15

Washington vs. Confederated Tribes,
447 U.S. 134 (1980) 13

STATUTES

Miss. Code Ann. § 21-1-59 2-3

Miss. Code Ann. § 37-5-1 4

Miss. Code Ann. § 37-5-3 4

Miss. Code Ann. § 37-7-103 . . . . . 5, 7, 16, 17

Miss. Code Ann. § 37-7-611 . . . . . passim

OTHER

Fed. R. Civ. P. 59 . . . . . i, 1, 12-13

James Wm. Moore et al.,
Moore's Federal Practice
¶ 607.04[12] (1993) 13

Robert L. Stern et al.,
Supreme Court Practice
§ 6.3 (7th ed. 1993) 12-13

Sup. Ct. R. 11.3 12

Sup. Ct. R. 13.4 12

Sup. Ct. R. 18 12

Sup. Ct. R. 18.6 1

No. 93-835
No. 93-836

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the Appellees move to dismiss this appeal from the District Court on the basis that the Appellants served a timely motion pursuant to Fed. R. Civ. P. 59(a) and (e) and then filed their notice of appeal before the

District Court decided the Rule 59 motion. In the alternative, the Appellees move the Court to affirm the opinion and order of the District Court because the question is so insubstantial as not to need further argument.

STATEMENT OF THE FACTS

Since 1926, Mississippi law has required that the boundaries of a municipal school district be, at a minimum, coterminous with its parent municipality. Thus, the residents of the city were always residents of the city school district. These residents elect the city council, which in turn appoints the members of school board for the city school district. The State of Mississippi attempted to change this policy in 1986 by repealing Miss. Code Ann. § 37-7-611, which provides that when a city annexes territory, the boundaries of the city school district automatically expand to encompass the territory annexed by its parent city.[1]

---

[1] In 1977 and 1978, the State of Mississippi attempted to create an exception to § 37-7-611 by amending Miss. Code Ann. § 21-1-59. These amendments provided that the extension by annexation of a municipality's boundaries across a county line would not affect the boundaries of the adjacent county school district unless that school district consented to allow the annexed area to be included in the municipal school district. J.S. App. 3a-4a.

In 1991, the District Court granted summary judgment in favor of the Appellees on their claim that the 1977 and 1978 amendments to § 21-1-59 are not enforceable because they were never precleared by the Attorney General. Dupree vs. Mabus, 776 F. Supp. 290, 303-04 (S.D. Miss. 1991) (Dupree I), vacated and remanded on other grounds sub. nom, Dupree vs. Moore, 117 L.Ed. 2d 609 (1992). No Appellant

After the repeal of § 37-7-611, the residents of an area annexed by the city would not necessarily be residents of the city school district; they could remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created the anomaly of the newly annexed residents continuing to elect directly the board members of their county, or suburban, school district, while indirectly selecting the board members of the city school district by participating in city council elections.

The repeal of § 37-7-611, as well as the amendments to § 21-1-59, limited the expansion of the Hattiesburg School District when its parent city expanded by annexation into neighboring Lamar County in 1979, 1981, 1985 and 1989 and into Forrest County, where the City of Hattiesburg is primarily located, in 1989. Because of these laws, the Hattiesburg School District did not expand to include the suburban property acquired by the City.

The State of Mississippi enforced these laws despite not gaining preclearance as required by the Voting Rights Act. In February 1990, the Appellees, individually as residents and registered voters of the City of Hattiesburg and in their official capacities as members of the school board of the Hattiesburg school district, filed this action under § 5 of the Voting Rights Act against the State of Mississippi. The

---

in the present appeal filed a cross-appeal of this portion of the District Court's judgment in Dupree I. As the Appellants now concede, no issues related to the enforceability of the amendments to § 21-1-59 are before the Court. J.S. p. 9 n.7

Appellees sought declaratory and injunctive relief to halt enforcement of the laws.[2]

In its first opinion in this litigation, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. Dupree vs. Mabus, 776 F. Supp. 290, 303 (S.D. Miss. 1991) (Dupree I), vacated and remanded sub. nom, Dupree vs. Moore, 117 L. Ed. 2d 609 (1992). The Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. ___, 114 L. Ed. 2d 691 (1991). On remand, the District Court held that, when measured against the principles outlined in Clark, the repealer of § 37-7-611 had not been precleared because the voting change effected by the repealer had not been specifically identified in the State's 1986 submission of other related voting changes. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II).

The focus of this appeal--the status of the repealer of § 37-7-611--requires a review of the submission histories of the Uniform School Law and the repealer of § 37-7-611. In 1986, the Mississippi Legislature passed the Uniform School Law, a sweeping act designed to provide Mississippi with a common system of school administration. Section 47 of the Uniform School Law repealed § 37-7-611 and twenty-two other statutes that dealt with "the creation and operation of municipal separate school districts." J.S. App. 112a.

---

[2] After the three-judge court convened, the Lamar County and Forrest County school districts and their school boards intervened as Defendants. In both districts, the board members are elected directly by the residents of the county school district. Miss. Code Ann. §§ 37-5-1, -3 (1990).

Section 52 of the Uniform School Law amended Miss. Code Ann. § 37-7-103. Prior to 1986, § 37-7-103 permitted a county board of education to abolish the boundaries of any school district in the county except a municipal school district. With the consent of the municipal school district, the county board of education could add to the municipal school district any part of the county adjoining the municipal school district or detach territory from the municipal school district and merge it into the county school system. Section 37-7-103 now provides that all school districts have the authority previously conferred on county boards of education. J.S. App. 113a-114a.

The State submitted the Uniform School Law to the Attorney General for preclearance on July 22, 1986. J.S. App. 69a. The submission consisted of a one-page cover letter, a thirteen-page document containing information arranged in accordance with the Department of Justice regulations governing § 5 submissions and a 467-page looseleaf booklet titled "Senate Bill 2117 - Comparison of Current Law and New Law," which contained the typed version of the bill interspersed with photocopied pages of the then-current statute amended by particular sections of the Uniform School Law. J.S. App. 84a-143a.[3]

---

[3] The one-paragraph "Introductory Note" to the looseleaf booklet states that it provides "on a section by section basis each section of the current law which has been amended followed by each individual section of" the Uniform School Law. Thus, the State did not attempt to provide the Attorney General with a comparison of the prior law with the proposed law if the prior law was repealed. The Note also indicates that if a section of the Law creates "new law then only those particular sections will be denoted with no comparison of current law." The Note further stated that "[t]his section by

In 1986, § 51.25(a) of the regulations governing § 5 submissions to the Attorney General required that a copy of the enactment embodying the voting change be provided. J.S. App. 206a. In addition, § 51.25(b) stated that if the voting change was not "readily apparent on the face of the document provided under" § 51.25(a), the submission should contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting." J.S. App. 206a. The regulations did not require the submitting jurisdiction to provide a copy of the prior law being repealed or amended.

The State characterized its submission as follows:

> This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. . . . For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review. [J.S. App. 72a.]

The State then specifically identified thirteen of the 203 sections of the Uniform School Law. J.S. App. 72a-78a.

---

section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law." The Note concludes as follows: "By comparing each section of [the Uniform School Law] and the current practice, the changes to current law are easily identified." By the State's own admission, however, these comparisons were made only for statutes amended by the Law. J.S. App. 84a.

Section 47, which repealed § 37-7-611, was neither identified nor referred to anywhere in the thirteen-page submission. Section 47 does appear, without explanatory comment by the State, in a copy of the Uniform School Law supplied to the Attorney General and in the looseleaf booklet. Section 52, which amended § 37-7-103, was one of the thirteen sections specifically identified and discussed in the submission. J.S. App. 74a.

The discussion of § 52 in the State's submission consisted of a paraphrase of the then-current statute and the amended version but made no mention of § 47 or § 37-7-611. The analysis of § 52 did not refer in any way to the State's longstanding policy, reflected in § 37-7-611, of automatically extending a city school district's boundaries after an annexation by its parent city. The State did not suggest that § 52 was designed to replace this policy.

The Attorney General responded to the State's submission on August 29, 1986. He did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." J.S. App. 147a (emphasis added). The voting change effected by the repeal of § 37-7-611 was not specifically identified in the submission and was not precleared. The State acknowledged that the status of § 37-7-611 remained unclear after the Attorney General's response, J.S. App. 173a, and conceded in the District Court that its July 1986 submission contributed to the uncertainty. Memorandum in Support of State Defendants' Motion to Dismiss, p. 8.

In formal recognition of the absence of preclearance, the State submitted § 47 to the Attorney General on December 30, 1987. J.S. App. 149a. In its submission of § 47, the State acknowledged that the entire Uniform School Law was

not precleared by the Attorney General. See, e.g. J.S. App. 152a ("The major part of [the Uniform School Law], as it deals with the Voting Rights Act . . . has already been precleared.") (emphasis added); J.S. App. 155a ("[M]ost of" the Uniform School Law has "already been precleared by the United States Justice Department.") (emphasis added); J.S. App. 155a ("[S]ubstantive parts of" the Uniform School Law were "precleared by the Justice Department on August 29, 1986.") (emphasis added).

On January 27, 1989, the State responded to the Attorney General's request for additional information concerning the repeal of § 37-7-611. The State again acknowledged that the Uniform School Law had not been precleared in its entirety in 1986. Moreover, the State expressly represented that § 47 had not been specifically identified in the earlier submission of the Uniform School Law.

> On July 22, 1986, the State of Mississippi submitted [the Uniform School Law] for preclearance under Section 5 of the Voting Rights Act. . . . On August 29, 1986, [the Uniform School Law] was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.
>
> On December 30, 1987, the State of Mississippi submitted [the repealer of § 37-7-611] since [it] was not specifically identified in our original submission. [Lamar J.S. App. 3 (emphasis added).]

The Attorney General interposed an objection to the repeal of § 37-7-611 on March 31, 1989.[4]

On January 12, 1990, the State sought reconsideration of the Attorney General's limited preclearance of the Uniform School Law or, alternatively, the objection interposed to the repeal of § 37-7-611. J.S. App. 169a. The State contended for the first time that the entire Uniform School Law had been submitted and precleared in 1986. J.S. App. 170a-174a. On May 25, 1990, the Attorney General rejected the State's position.

> At the outset, we note that the state makes several claims about the preclearance status of the instant changes which appear to seriously misconstrue the structure, purpose, and history of the preclearance requirement. . . .
>
> Section 5, as interpreted by the courts and our submission guidelines, plainly fixes the responsibility for identifying voting changes on the state, not the United States Attorney General, yet the state appears to be arguing in

---

[4] The Attorney General concluded the repeal of § 37-7-611 would likely "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." The State did not provide a rationale for the creation "of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." J.S. App. 167a.

> both instances that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made. [J.S. App. 200a-201a.]

In Dupree I, the District Court concluded the 1986 repealer of § 37-7-611 had been adequately identified in the State's submission of the Uniform School Law and, therefore, precleared by the Attorney General when he did not interpose an objection within 60 days. The Appellees in this appeal filed an appeal of that portion of the District Court's judgment in Dupree I. The Court vacated and remanded Dupree I in light of its decision in Clark vs. Roemer, which emphasized a state's obligation to identify with specificity the voting change for which it seeks preclearance. On remand, the District Court ruled in Dupree II that

> Mississippi's 1986 submission is precisely that circumstance condemned by Clark v. Roemer. Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi has done here, this court would be ignoring Clark's clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission.

J.S. App. 20a. As a result, the District Court held the repealer of § 37-7-611 to be ineffective and unenforceable

until Mississippi obtains administrative or judicial preclearance. J.S. App. 20a-21a.[5]

ARGUMENT

A. The appeal should be dismissed because the Appellants filed their notice of appeal before the District court decided the Appellants' Rule 59 motion.

After the District Court entered its Memorandum Opinion and Order in Dupree II on August 30, 1993, the Appellees submitted a proposed final judgment to that Court. Prior to entry of a final judgment, the Appellants on September 13 served a joint motion pursuant to Fed. R. Civ. P. 59 to alter or amend the August 30 order or, in the alternative, for a new trial. Motion App. 1a.[6] On September 24, while the Rule 59 motion was pending, the Appellants filed a "notice of interlocutory appeal." J.S. App. 36a. In an October 29 order, the District Court announced it would withhold ruling on the Appellants' Rule 59 motion because the

---

[5] The Lamar Appellants' contention, Lamar J.S. 11-12, that the District Court failed to issue a remedy is baseless. Dupree II enjoins the enforecement of the repealer of § 37-7-611 until the State complies with the Voting Rights Act. J.S. App. 20a-21a. This remedy is consistent with Clark vs. Roemer: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." 114 L. Ed. 2d at 701.

[6] The Appellants also filed joint motions for a remedy and for a stay pending appeal. The District Court reserved ruling on the former and denied the latter. Lamar J.S. App. 2.

relief sought in the motion "would intrude needlessly upon the proceedings" before the Supreme Court. Lamar J.S. App. 2.

The jurisdictional question presented is whether the Appellants' Rule 59 motion suspended the finality of the August 30 order. As noted, the District Court has not yet acted on the Rule 59 motion because of the present appeal. The Court has held that a motion to alter or amend or for a new trial suspends the finality of the original judgment and renders ineffective a notice of appeal filed prior to resolution of the pending motion. As a result, this appeal should be dismissed.

The Court has consistently treated petitions for rehearing or motions to alter a lower court's judgment as suspending the time in which a petition for certiorari or a notice of appeal must be filed. "This proposition applies to all cases, civil and criminal, that arise from either federal or state courts . . . [and] also applies to motions for reconsideration of judgments of federal district courts directly appealable to the Supreme Court." Robert L. Stern et al., Supreme Court Practice § 6.3, at 285 (7th ed. 1993).[7]

In FCC vs. League of Women Voters, 468 U.S. 364 (1984), the Court noted that "the filing of a . . . motion to amend or alter the judgment 'suspend[s] the finality of the [original] judgment,' thereby extending the time for filing a

---

[7] This proposition is expressly stated in the Court's Rules governing certiorari (Rule 13.4) but is omitted from the Rule governing appeals (Rule 18). Former Rule 11.3, which concerned appeals, contained this proposition. Thus, although the "matter is not free from doubt . . . , [i]t is most unlikely that the Court intended, sub silentio, to abandon this 'well-established rule.'" Stern, supra, § 7.3,at 388.

notice of appeal 'until [the lower court's] denial of the motion . . . restores' that finality." Id. at 373 n.10 (quoting Communist Party vs. Whitcomb, 414 U.S. 441, 445 (1974) (direct appeal from three-judge court)); accord Washington vs. Confederated Tribes, 447 U.S. 134, 149 & n.24 (1980) (direct appeal from three-judge court) (motion for partial new trial rendered nonfinal all issues decided by that court); 12 James Wm. Moore et al., Moore's Federal Practice ¶ 607.04[12], at 9-29 (1993).

As seen by their notice of interlocutory appeal, the Appellants contend the District Court's August 30 order is not a final order. Assuming, without conceding, that they are correct, the appeal should still be dismissed.

> In this context, finality relates not to the final or interlocutory nature of the judgment on the merits but to the finality of the action being taken by the lower court. If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of [an appeal]. And thus it is that the time for [filing an appeal] commences on the date when certainty and finality attach to the action taken by the lower court. Where rehearing has been sought, that date is the one on which rehearing was denied.

Stern, supra, § 6.3, at 285.

The Court in League of Women Voters also pointed out that "the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a postjudgment

motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicated' in the court's first judgment." 468 U.S. at 373 n.10 (quoting Department of Banking vs. Pink, 317 U.S. 264, 266 (1942) (per curiam)). In this appeal, the Appellants' Rule 59 motion seeks substantive changes in the District Court's August 30 order, Motion App. 1a, and is not directed to collateral matters. See League of Women Voters, 468 U.S. at 364 n.10 (post-judgment motion regarding "wholly collateral" issue of attorneys' fees held not to suspend finality of district court's original judgment).

This appeal should be dismissed.

B. The question is not substantial because the District Court's interpretation of the preclearance requirements of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act.

The District Court's decision in Dupree II is a straightforward application of Clark vs. Roemer. The District Court's holding that the State failed to identify with specificity the voting change for which it sought preclearance does not depart from the Court's precedent or create a conflict with a decision from another circuit. The decision does not pose problems for the preclearance process because the Justice Department's position prevailed in the District Court. The Appellees respectfully submit that the District Court's decision in Dupree II is so obviously correct that it should be summarily affirmed.

The argument advanced by the Appellants and the dissenting judge in Dupree II would significantly reduce the responsibility of jurisdictions covered by the Voting Rights Act to identify clearly the voting changes submitted to the

Attorney General for preclearance. The diminution of that burden on submitting jurisdictions would create administrative problems for the Attorney General. In addition, the view advanced by the Appellants and the dissent below "would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether." Clark vs. Roemer, 114 L. Ed 2d at 704-05. Ultimately, the purpose envisioned by Congress for administrative preclearance -- providing states with an expeditious method of having nondiscriminatory voting laws implemented without undue delay -- would be disserved.

Since Allen vs. State Board of Elections, 393 U.S. 544 (1969), the Court has interpreted the Voting Rights Act to require that a state submit its voting changes to the Attorney General in an "unambiguous and recordable manner." Id. at 571; see United States vs. Board of Comm'rs, 435 U.S. 110, 136 (1978) ("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). The regulations governing § 5 submissions have always contained a similar requirement. City of Rome vs. United States, 446 U.S. 156, 169 n.6 (1980).

In McCain vs. Lybrand, 465 U.S. 236 (1984), the Court provided extensive direction on this issue, and the principles articulated in that decision were reaffirmed in Clark vs. Roemer.

> We made clear [in McCain] that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a

> submission pertains only to identified changes in that legislation. We established also that any ambiguity in the scope of a preclearance request must be resolved against the submitting authority.

114 L. Ed. 2d at 703 (citations omitted). In reversing the district court's holding that the Attorney General's preclearance of certain identified voting changes constituted preclearance of other related but unidentified voting changes, the Court in Clark reiterated the importance of specificity in the state's submission: The state "must identify with specificity each change that it wishes the Attorney General to consider." Id. at 704. The Court also reaffirmed the presumption established in McCain that the Attorney General will review only the voting changes specifically described in the state's submission. Id.

In light of Clark, the District Court in Dupree II was correct in holding that the State did not properly submit the repealer of § 37-7-611 to the Attorney General in 1986 when it submitted other related voting changes. The submission of the Uniform School Law in 1986 did not contain an explanation of the process by which municipal school district boundaries automatically expand to encompass territory in an adjacent school district after an annexation by its parent municipality. Nor did the 1986 submission indicate that this process was repealed by § 47 of the Uniform School Law. Moreover, the submission is utterly silent about any voting change effected by the repeal of § 37-7-611.

The Appellants contend the discussion of § 37-7-103 in § 52 of the State's submission put the Attorney General on notice that this statute was designed to replace the automatic extension policy of § 37-7-611 and serve as the sole method

of altering school district boundaries. The State, however, did not describe the amendment of § 37-7-103 in this manner in the submission. The discussion of amended § 37-7-103 simply reveals that any school district could voluntarily agree with any other school district to a revision of the boundaries of the districts. J.S. App. 74a. Thus, the Appellants' position is contrary to Clark: "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 114 L. Ed. 2d at 704 (quoting McCain).[8]

The Appellants also point to the statements that the Uniform School Law was submitted "in its entirety" and that "the complete act is submitted for review." The use of these phrases, they argue, made the submission unambiguous. These phases do not identify any voting change, much less

---

[8] The Appellants emphasize the Mississippi Supreme Court's decision in Greenville Public School Dist. vs. Western Line Public School Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 117 L. Ed. 2d 649 (1991), which held that, even if the repealer of § 37-7-611 was not precleared, the amendment to § 37-7-103 repealed § 37-7-611 by implication under state rules of statutory construction. The Appellants contend the District Court in Dupree II should have deferred to the state supreme court's holding, Lamar J.S. pp. 15-17, or "recognized that § 37-7-103 must supersede § 37-7-611," J.S. p. 23 n.9. This issue is insubstantial because the District Court correctly held in Dupree II that "even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 18a-19a & n.10.

suggest that the State intended § 37-7-103 to replace § 37-7-611. As the Solicitor General noted in the appeal of Dupree I, it is doubtful the State "intended to submit the Uniform School Law 'in its entirety,' since most of its 203 sections have nothing to do with voting." Br. p. 17 n.13. A clear statement that voluminous legislation is submitted "in its entirety" does not satisfy Clark's requirement that a state clearly identify each voting change in its submission.

The Appellants contend that the bare citation in the looseleaf booklet of § 37-7-611 and twenty-two other statutes dealing with the creation and operation of municipal school districts suffices for a proper submission of the voting change effected by the repeal of § 37-7-611. In other words, the Appellants suggest that although the State did not identify or explain the automatic extension policy in § 47 or elsewhere in the submission, the Attorney General should have understood that the State intended to change this policy by including § 37-7-611 in a list of repealed statutes in § 47. Their argument is plausible only if the Attorney General was duty bound to retrieve, review and study the more than 100 statutes, including § 37-7-611, listed, without elaboration, as having been repealed in the 1986 submission of the Uniform School Law.

The Court in Clark vs. Roemer expressly rejected the view of § 5 pressed by the Appellants and the dissent below. A state's obligation to identify with specificity each voting change is not a favor bestowed on the Attorney General. Noting the thousands of voting changes reviewed annually by the Attorney General, Clark requires that before a state's voting change can be enforced, the state must "identify, submit, and receive approval for" the change. 114 L. Ed. 2d at 704. Requiring the Attorney General to conduct independent research to determine whether a submission

contained unidentified voting changes "would add to the Attorney General's already redoubtable obligations." Id.

Today, virtually all voting changes are submitted by covered jurisdictions to the Attorney General for preclearance because of the cost and time constraints in litigating in the District of Columbia District Court. By allowing for administrative preclearance, however, "Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." McCain, 465 U.S. at 246. Under either method of preclearance, the covered jurisdiction bears the burden of proving that the change in voting does not have a discriminatory purpose or effect, and in both instances "federal officials are confronted with the same 'difficult substantive issue.'" Id. at 247 (quoting Allen, 393 U.S. at 558). In the light of the emphasis on administrative preclearance, Clark notes the "requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." 114 L. Ed. 2d at 704.

The Appellants' position would permit a state to claim that the submission of an act is complete and unambiguous, even without specifically identifying each voting change sought to be reviewed, as long as the State includes the catch-all phrase "the complete act is submitted for review." In response, the Attorney General would likely interpose an objection rather than risk approving a discriminatory voting change not identified in the submission but otherwise a part of the "complete act" submitted for review. This response, however, might well delay "the implementation of validly enacted, nondiscriminatory state legislation," a primary objective of administrative preclearance. See Morris vs.

Gressette, 432 U.S. 491, 503 (1977).[9] Although such a response by the Attorney General would be the most prudent exercise of his responsibilities, it "would only add acrimony to the administration of § 5." Georgia vs. United States, 411 U.S. 526, 540-41 (1973). In the context of judicial preclearance, a covered jurisdiction could hardly argue that the District of Columbia District Court approved a voting change that was not identified in the complaint or litigated at trial. To hold a state to a less demanding standard in seeking administrative preclearance would render the declaratory judgment route superfluous. Cf. id. at 538 ("Any less stringent standard [for the burden of proof] might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance.").

The Appellants also base an argument on the regulation (§ 51.35) in effect in 1986 that required the Attorney General to request additional information if he considered the State's July 1986 submission to be incomplete. J.S. App. 208a. This position is wrong for two reasons. First, the Appellants presume the Attorney General considered the State's submission to present the entire Uniform School Law for approval. Rather, it is clear the Attorney General considered only the thirteen specifically identified voting changes to be before him for review. The August 29, 1986 letter confirmed this view of the submission: "The Attorney General does not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in your July 22,

---

[9] The Appellants' reliance on Morris is misplaced because the issue presented in this appeal--whether a voting change was properly submitted to, and evaluated by, the Attorney General--was not present in Morris. The submission in Morris was unambiguous. 432 U.S. at 502, 504 & n.19.

1986, letter." J.S. App. 147a. As to the thirteen specifically identified voting changes, the State's submission was complete. Thus, the Attorney General had no reason to request additional information regarding those changes.

Second, the Appellants' reliance on the lack of a request reflects a flawed perception of the purpose of the regulation, which allows the 60-day period for action to be suspended by a request for additional information. "The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia vs. United States, 411 U.S. at 540. The regulation enables the Attorney General to make an informed decision by requesting additional information relevant to the changes identified in the initial submission. The regulation is not a mechanism for the Attorney General to ferret out other potential voting changes a state neglects to identify. A state knows better than anyone what it wishes precleared and the burden of uncovering voting changes in a submission should not be, as the Appellants suggest, the responsibility of the Attorney General.

In summary, Dupree II correctly applied Clark vs. Roemer and prohibited the State from enforcing the repealer of § 37-7-611 until the State receives either administrative or judicial preclearance. In response to the potential for discrimination in the electoral scheme caused by the repeal of § 37-7-611 the Attorney General interposed an objection when the repealer was specifically identified in a submission by the State of Mississippi. Dupree I nevertheless declared the Attorney General's objection invalid. On remand from the Court, Dupree II upheld the Attorney General's objection because the State did not specifically identify the voting change effected by the repealer in the 1986 submission of the

Uniform School Law. The District Court's decision is correct and further argument is unnecessary.[10]

CONCLUSION

For these reasons, the appeal should be dismissed or the District Court's decision should be affirmed.

RESPECTFULLY SUBMITTED,

HOLMES S. ADAMS
(Counsel of Record)
W. DAVID WATKINS
PERRY SANSING
BRUNINI, GRANTHAM, GROWER & HEWES
Post Office Drawer 119
Jackson, Mississippi 39205
Telephone: (601)948-3101

December 23, 1993

---

[10] The Lamar Appellants raise several questions concerning standing and the proper scope and application of § 5. Lamar J.S. pp. 9-15, 17-18. These questions are insubstantial because Dupree I correctly held that the Appellees had standing and that § 5 applies to the repealer of § 37-7-611. No appeal was taken from these portions of the judgment in Dupree I. Moreover, Clark vs. Roemer clearly explained the duties of a covered jurisdiction under § 5.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, JEFF R. BOWMAN, KATHRYN JONES AND CHARLOTTE TULLOS, Individually and in Their Official Capacities as Members of the Board of Trustees of the Hattiesburg Public School District — **PLAINTIFFS**

VS. — **CIVIL ACTION, NO. H90-0043(W)**

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and the STATE OF MISSISSIPPI — **DEFENDANTS**

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, in Their Official Capacities, Charles L. Camerson, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis — **DEFENDANTS/INTERVENORS**

and

FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities — **DEFENDANTS/INTERVENORS**

JOINT MOTION FOR NEW TRIAL, OR TO ALTER OR AMEND ORDER

COME NOW the Defendants Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi, Defendant/Intervenors The Lamar County Board of Education and Trustees, in Their Official Capacities, and Defendants/Intervenors Forrest County School District and Trustees, by and through their attorneys of record, and make this their Joint Motion for a New Trial pursuant to Rule 59(a) or Motion to Alter or Amend Order pursuant to Rule 59(e), on the grounds as follows:

1. The Court may open its Order if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment to address:

(1) The appropriate remedy, and the practical implications, given the holding that the repealer of Section 37-7-611 has not been precleared under Section 5 of the Voting Rights Act of 1964, when Section 52 of the Uniform School Law, codified as Section 37-7-103, Miss. Code Ann. (Supp. 1987), was held precleared.

(2) Whether under precedent, including Dotson v. City of Indianola, 514 F.Supp. 397 (N.D. Miss. 1981), aff'd, 455 U.S. 936 (1982), 739 F.2d 1022 (5th Cir. 1984), the appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, i.e., the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in Lamar and Forrest counties would not be allowed to vote for the County School Boards.

(3) The propriety of enforcing state law as it pre-existed under 37-7-611 (unchanged since 1926 if the 1986 changes are deemed not precleared) considering the impact of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) precluding federal enforcement of state statutes.

(4) The failure of preclearing the 1966 Hattiesburg annexation creates a gap of contiguous annexation in violation of state law.

(5) The three-judge court found that "The state's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (P. 19 of the Memorandum Opinion and Order on Remand from the Supreme Court of the United States, as issued August 27, 1993). This finding again raises the question of the affect of 28 C.F.R. Sections 51.25 and 51.35 (1986) which were in effect at the time.

(6) Although the three-judge court rejected the notion of repeal by implication, there remain questions of Mississippi statutory construction concerning the impact of precleared Section 37-7-103 over pre-existing 37-7-611, with the operation of state law.

(7) There then arise by necessity the issues concerning enforcement of the Mississippi Supreme court decision in Greenville Public School District, et al. v. Western Line Consolidated School District, 575 So.2d 956 (Miss. 1990).

(8) Other issues as to standing of parties and ripeness of the issues are raised again in terms of whether, if boundary lines are changed for the Lamar County and Forrest County School Districts, those districts must move to intervene in "United States of America and Zandra Pittman, et al. v. The State of Mississippi, et al. and Hattiesburg Public School District", Civil Action, No. 4706 and/or whether Hattiesburg must join Lamar County as a necessary party under Rule 19.

Respectfully submitted,
MIKE MOORE, Attorney General of Mississippi, and THE STATE OF MISSISSIPPI, DEFENDANTS

Robert E. Sanders
Giles W. Bryant
Special Assistant Attorneys General
P. O. Box 220
Jackson, MS 39205
(601) 359-3692

By: /s/ Giles W. Bryant

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS/INTERVENORS

Dennis L. Horn
Horn & Payne
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170
MSB #2645

William E. Andrews, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053
MSB #1605

By: /s/ Dennis Horn

FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities,

DEFENDANTS/INTERVENORS

James H. C. Thomas, Jr.
206 West Front Street
Hattiesburg, MS 39401

By: /s/ James H.C. Thomas, Jr.

John L. Maxey, II
S. Mark Wann

Maxey, Pigott, Wann & Begley
Suite 410, Heritage Building
401 East Capitol Street
P. O. Box 3977
Jackson, MS 39207-3977

By: /s/ Mark Wann